



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 13 OF 2017

PETER KARUNG'O NJOROGE.....PETITIONER

VERSUS

HIJAZ DEVELOPMENT LIMITED1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS2ND RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY3RD RESPONDENT

AND

SYOKIMAU RESIDENTS ASSOCIATION LTD.....1ST INTERESTED PARTY

C.M CONSTRUCTION (EA) LTD2ND INTERESTED PARTY

RULING

1. This Ruling is in respect to the Notices of Preliminary Objection by the 1st Respondent and the 3rd Respondent dated 28th August, 2017 and 13th September, 2017 respectively.
2. In the said Notices of Preliminary Objection, the Applicants have averred that this court does not have the jurisdiction to hear and determine the Petition by virtue of Sections 10, 13, 15 and 19 of the Physical Planning Act; Sections 129 and 130 of the Environment Management and Co-ordination Act as read together with Article 159(1) and 169(1) (d) and (2) of the Constitution.
3. The two Notices of Preliminary Objection proceeded by way of written submissions.
4. The 1st Respondent's counsel submitted that under the Physical Planning Act, there is a procedure and mechanism for resolving disputes arising from physical planning decisions of the 2nd Respondent; that the decision of the Director for Physical Planning is appealable in the Liaison Committee and that the Liaison's Committee's decision is appealable to the National Physical Planning Liaison Committee.
5. Counsel submitted that the jurisdiction of this court with respect to the permits issued by the 2nd Respondent is appellate.
6. The 1st Respondent advocate submitted any complaint in respect of a licence issued by the 3rd Respondent should be filed with the National Environment Tribunal.
7. The 3rd respondent submitted that the subject of the Petition falls within the ambit of Section 129(1) of Environmental Management and Co-ordination Act (EMCA); that environmental rights relating to the process and issuance of an Environmental Impact Assessment licence are contemplated by Section 129(1) of the Environmental Management and Co-ordination Act (EMCA) and that by failing to file the Appeal at the Tribunal, the Petitioner failed to use the right forum and the Petition is an abuse of the court process.
8. Counsel submitted that under Section 13(4) of the Environment and Land Court Act, this court exercises appellate jurisdiction over decisions of subordinate courts and tribunals. The 2nd Interested Party supported the 1st and 3rd Respondents' submissions.
9. The Petitioner's advocate submitted that the questions raised in the Petition have both constitutional and statutory underpinnings; that the

Constitution recognizes the right to Fair Administrative Action and that this court has jurisdiction to deal with those issues.

10. Counsel submitted that this is not an ordinary suit but a constitutional Petition and that Tribunals and other forums cited by the Respondents do not have powers to grant the remedies for deprivation of fundamental rights.

11. Both the Applicants and the Respondents' advocates filed authorities which I considered.

12. In the Petition dated 21st July, 2017, the Petitioner alleges that the change of user, approval of plans and issuance of the Environmental Impact Assessment (EIA) licence in favour of the 1st Respondent in respect of L.R. No. 12715/429 (*the suit land*) was irregular.

13. According to the Petitioner, the Syokimau Area is a zoned location; that the suit land is situated in an area designated as a low density user zone (24) and that only one dwelling house is permitted for construction in the area.

14. The Petitioner's complaint is that in breach of his legitimate expectation, the 2nd Respondent issued a change of user in respect of the suit land from low density Multi Dwelling Residential user to medium density Multi Dwelling residential user and that the approval of the building plans was without public participation or consultation with neighbours and other key stakeholders.

15. It is the Petitioner's contention that despite the County Director of Environment in charge of Machakos objection to the issuance of the Environmental Impact Assessment (EIA) licence, the 3rd Respondent went ahead to issue the licence to the 1st Respondent; that the provisions of the Environmental Management and Co-ordination Act (EMCA) and the Constitution have not been complied with and that the public documents relating to the development have been kept out of reach of the Petitioner.

16. In the prayers, the Petitioner is praying for a declaration that the development of the suit property by the 1st Respondent infringes on his right to a clean and healthy environment, amongst others.

17. It is true, as submitted by the 1st and 3rd Respondents that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament; that procedure should be strictly followed (*See Speaker of National Assembly vs. James Njenga Karume (1992) eKLR; Samson Chembe Vuko vs. Nelson Kilumo & 4 others (2014) eKLR and Mutanga Tea & Coffee Company Ltd. vs. Shikara Limited & another (2015) eKLR*).

18. However, more often than not, the jurisdiction of such Tribunals or bodies is usually limited in scope. The jurisdiction of the National Environment Tribunal is limited under Section 129 of the Environmental Management and Co-ordination Act (EMCA) to hearing appeals in respect to: the grant of a licence or permit, or the transfer of a licence or permit under the Act; the imposition of any condition on a licence issued under the Act; the revocation, suspension or variation of the licence under the Act and the imposition of an environmental restoration order or environmental improvement order by the National Environmental Management Authority (NEMA).

19. On the other hand, the jurisdiction of the Liaison Committees established under the Physical Planning Act has the jurisdiction of dealing with a complaint by a person who is aggrieved by the decision of the local authority refusing his application for development permission (*See Section 34 of the Physical Planning Act*).

20. However, unlike the National Environment Tribunal and the Liaison Committees which have limited jurisdiction, the Environment and Land Court has unlimited original and appellate jurisdiction to determine any dispute relating to land and environment (*See Section 13(1) of Environment and Land Act*). Indeed, this court, unlike the National Environment Tribunal and the Liaison Committees, is the only one mandated to hear and determine applications for redress of a denial, violation or infringement of, or threats to, rights or fundamental freedoms relating to the environment and land.

21. Considering that the Petitioner is seeking to enforce the right to a clean and healthy environment (*Article 70*), the right of access to information (*Article 35*) and the right to fair administrative action (*Article 47*), it is only this court that can determine the Petition and not the NET or the Liaison Committee. The two bodies are not clothed with the jurisdiction to hear and determine matters which are purely constitutional in nature, neither can they issue judicial review orders. Considering that the issues raised in the Petition are a mixture of legal issues, ranging from the legality of the licence that was issued by National Environmental Management Authority (NEMA), to the question of whether there was public participation before the 2nd and 3rd Respondents issued the requisite approvals to the 1st Respondent to develop the suit land and whether the Petitioner's rights have been infringed or are likely to be infringed, it is only this court that can hear those issues, and not NET or the Liaison Committees.

22. For those reasons, I find that the Notices of Preliminary Objections filed in this matter are not meritorious. I therefore dismiss them with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE